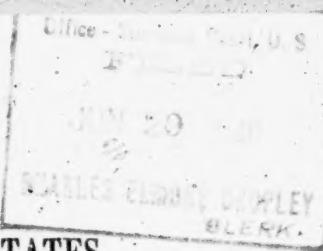


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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 191

THE UNITED STATES,

Appellant,

vs.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED.

APPEAL FROM THE COURT OF CLAIMS.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

HERMAN J. GALLOWAY,

FREDERICK W. P. LORENZEN,

Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1940

No. 191

THE UNITED STATES,

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vs.

KATE B. GOLTRA AND E. FIELD GOLTRA, JR., EXECUTORS OF THE ESTATE OF EDWARD F. GOLTRA, DECEASED.

APPELLEES' STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

First: The Question as to Jurisdiction.

The judgment from which the appellant appeals was rendered under a special jurisdictional Act which is as follows (Private Act No. 69, approved April 18, 1934, 48 Stat. 1322):

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims of the United States, whose duty it shall be, notwithstanding the lapse of time or the bar of any statute of limitations or previous court decisions, to hear, consider, and render judgment on the claims

of Edward F. Goltra against the United States for just compensation to him for certain vessels and unloading apparatus taken, whether tortiously or not, on March 25, 1923, by the United States under orders of the Acting Secretary of War, for the use and benefit of the United States; and any other legal or equitable claims arising out of the transactions in connection therewith; *Provided*, That separate suits may be brought with respect to vessels and the unloading apparatus, but no suit shall be brought after the expiration of one year from the effective date of this Act; *Provided further*, That either party may appeal as of right to the Supreme Court of the United States from any judgment in said case at any time within ninety days after the rendition thereof, and any judgment rendered in favor of the claimant shall be paid in the same manner as other judgments of said Court of Claims are paid."

Appellees submit for consideration of the Court the question of whether the language of this Act is sufficient to permit an appeal as distinguished from the right to petition for a writ of certiorari. In this connection appellees call the Court's attention to its decisions in *Colgate v. United States*, 280 U. S. 43, and *Assiniboine Indian Tribe v. United States*, 292 U. S. 606. In the light of the language used in the special Act herein and in the light of its legislative history set out on pages 3-4 of the appellant's statement as to jurisdiction, appellees believe that it was the intention of Congress to permit an appeal as distinguished from providing merely for the right to petition for a writ of certiorari. For this reason appellees confine themselves to submitting the jurisdictional question to the Court without taking a position thereon.

Second: The Question Raised by the Appeal is Unsubstantial and the Judgment Should be Affirmed.

Appellant does not appeal from the decision in appellees' favor on the merits. The appeal is addressed solely to the

question of whether the Court of Claims erred in holding that there should be included in the judgment "interest at six percent per annum, not as interest but as a part of just compensation". (Opinion, R. 55).

In order to understand the nature of the judgment made, it is necessary briefly to consider the facts found by the Court of Claims and accepted by the defendant on this appeal.

On May 28, 1919, Goltra and the United States, acting through the Chief of Engineers, entered into a contract, referred to in this case as the original contract, and on May 26, 1921, the same parties entered into a supplemental contract (Finding 6). These contracts, which are respectively Exhibits B and C to the petition (Finding 6), gave Goltra the right to possess a fleet of nineteen steel barges and four steel towboats to be operated on the Mississippi River and its tributaries (Exhibit B of petition). Under the contract Goltra was to have possession as lessee for a term of five years after the delivery of the fleet (*id.*). The only rental payable was to consist of the net earnings of the fleet and these net earnings were to be credited to the purchase price of the fleet if Goltra exercised an option conferred upon him to purchase the fleet at an appraised value (*id.*). Under this option provision the balance of the purchase price was payable in fifteen equal annual installments, (*id.*). Goltra in fact twice exercised his option but appellant refused to perform the option provision (Findings 10 and 42). Goltra thus in addition to having a lessee's property rights in the fleet had the other property rights conferred upon him by the option provisions.

Before the fleet was completed and delivered to Goltra, the appellant established a large line of its own on the Mississippi River (Finding 8). The existence of this competing barge line led to difficulties between Goltra and the Secre-

Secretary of War under whose jurisdiction the competing line was operated (Findings 9, 11, 12, 13 and 14).

The original contract was subject to cancellation if in the judgment of the Chief of Engineers, who was designated the lessor, Goltra had not performed his obligations thereunder (Exhibit B of petition; Opinion, R. 50).

Within a few months after the fleet had been delivered to Goltra (Findings 15 and 23), the Secretary of War, not the Chief of Engineers, purported to cancel Goltra's contract and he demanded a return of the fleet by delivery to Colonel Ashburn, Chief of the competing Government barge line (Finding 23). Goltra refused to comply with the Secretary of War's demand (Finding 25). Thereafter, on March 22, 1923, Colonel Ashburn was authorized by the Acting Secretary of War to take possession of the Goltra fleet (Finding 27).

The manner in which Colonel Ashburn carried out this mandate is described by the Court of Claims as follows (Finding 28):

"On Sunday, March 25, 1923, while plaintiff was in New York, Ashburn, and several men under his command, acting under orders of the Acting Secretary of War, went to the several places where seventeen of the barges and the four towboats lay moored in the possession of plaintiff's employees and took them from the possession of said employees without the consent of plaintiff or his employees for the use and benefit of the United States."

The Goltra fleet remained in the custody of appellant until September, 1924 (Finding 37). Under a temporary restraining order issued September 4, 1924, possession of the fleet was temporarily returned to Goltra (Finding 39) but after further court action the injunction was dissolved

(Finding 40). Thereafter "defendant (appellant) has retained possession of the boats and barges * * * and has caused the same to be operated as a part of the Mississippi Warrior Service," (Finding 40).

The court found that Goltra had performed all his obligations under the contracts (Findings 32, 33, 34, 35; Opinion, R. 51). Furthermore, the Chief of Engineers, to whose judgment the contracts had entrusted the determination of whether Goltra had or had not performed his contracts, at no time formed a judgment that Goltra had not performed his obligations thereunder (Findings 31, 38; Opinion, R. 53).

Goltra expended very substantial sums in connection with the original and supplemental contracts, including sums for improving the fleet, certain real estate used in connection therewith and repairing damage done to the fleet by appellant (Findings 43, 44, 45, 46, 47, 48, 50, 51). For these expenditures Goltra was never reimbursed and, appellant benefited thereby when it took the property (*id.*; and Finding 33).

It follows that when the appellant took possession of Goltra's fleet for the use and benefit of the United States, the right to possession and other contract rights in relation to the fleet which were valuable property rights and belonged to Goltra were taken from him.

For this taking of Goltra's fleet and other property rights, including certain rights under the supplemental contract, the special jurisdictional Act provides that the Court of Claims shall hear, consider and render judgment on Goltra's claims for just compensation. Under the circumstances thus disclosed, it is abundantly clear that the Court of Claims properly included as part of the recovery a sum measured by interest on the principal amount awarded.

A. UNDER THE SPECIAL JURISDICTIONAL ACT THE COURT WAS REQUIRED TO INCLUDE A SUM MEASURED BY INTEREST.

The special Act provides that judgment shall be rendered for just compensation for the taking of Goltra's fleet and other claims arising out of that taking. Since the decision by this Court in *Seaboard Airline Ry. v. United States*, 261 U. S. 299, a sum measured by interest has uniformly been made a part of all judgments wherever the statutory measure of recovery is just compensation. This Court has not made any distinction between those cases indicative strictly of the exercise of the power of eminent domain and other cases involving a somewhat different basis for recovery.

A sum measured by interest has been made a part of an award for just compensation prescribed in Acts of Congress for land taken under such Acts, *Seaboard Air Line Ry. v. United States*, 261 U. S. 299, 304; *United States v. Benedict*, 261 U. S. 294; for leases taken under such Acts, *Phelps v. United States*, 274 U. S. 341; see also *Duckett & Co. v. United States*, 274 U. S. 765, reversing 62 C. Cls. 781, judgment for interest entered 64 C. Cls. 700; for products and supplies ordered under such Acts, *Liggett & Myers v. United States*, 274 U. S. 215; for the taking of contract rights under such Acts, *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; and for the cancellation or suspension of contracts under such Acts, *DeLaval Steam Turbine Co. v. United States*, 70 C. Cls. 51, affirmed 284 U. S. 61; *Barrett Co. v. United States*, 273 U. S. 227, judgment for interest entered 66 C. Cls. 293. This Court has more recently reviewed the principles established by the foregoing decisions in *Jacobs v. United States*, 290 U. S. 13. In *Waite v. United States*, 282 U. S. 508, this Court held that an Act of Congress granting to the owner of a patent "reasonable and entire compensation" where the United States had used a patent without the owner's permission

should be construed in the same manner as Acts awarding just compensation and a sum measured by interest was accordingly held to be a proper part of the recovery.

The Court of Claims likewise in an unbroken series of decisions has held a sum measured by interest to be a part of the recovery where Congress has indicated that just compensation should be the measure of recovery.¹

When Congress passed the special jurisdictional Act herein it knew the meaning of the phrase "just compensation" as it had been interpreted in innumerable decisions of this Court and of the Court of Claims. Indeed Congress had appropriated millions of dollars to pay awards including sums measured by interest under provisions of statutes which required the award of just compensation. In these circumstances the presumption arises that Congress used the words "just compensation" in the full legal significance given them by repeated judicial interpretation. *McCool v. Smith*, 1 Black 459, 469; *Case of the Sewing Machine Companies*, 18 Wall. 553, 584; *The "Abbotsford"*, 98 U. S. 440, 444; *United States v. Mooney*, 116 U. S. 104, 106; *Kepner v. United States*, 195 U. S. 100, 124; *United States v. Merriam*, 263 U. S. 179, 187; *Hecht v. Malley*, 265 U. S. 144, 153; *Poe v. Seaborn*, 272 U. S. 101, 116.

The contention in appellant's jurisdictional statement that interest cannot be permitted against the United States unless expressly authorized by contract or by Congress

¹ *Benjamin C. Grimes v. United States*, 58 C. Cls. 398; *Minnie Moore, Admtnistratrix v. United States*, 60 C. Cls. 326; *Yorkview Finance Corp. v. United States*, 60 C. Cls. 646; *F. C. Mattern & F. L. Carre, Execs. v. United States*, 66 C. Cls. 559; *Atlantic Refining Co. v. United States*, 59 C. Cls. 108; *Consorzio Veneziano v. United States*, 64 C. Cls. 11; *Ocean S. S. Co. of Savannah v. United States*, 64 C. Cls. 98, certiorari denied 277 U. S. 584; *John Russell Smith v. United States*, 67 C. Cls. 182; *Grays Harbor Motorship Corp. v. United States*, 71 C. Cls. 167; *Nitro Powder Co. v. United States*, 71 C. Cls. 369, 374; *Wheeling Steel Corp. v. United States*, 71 C. Cls. 571; *Virginia Engineering Co. v. United States*, 89 C. Cls. 457.

is of no aid to appellant's case. As appellees have shown, the present jurisdictional Act by using the phrase "just compensation" expressly authorizes the award of a sum measured by interest. In none of the appellant's cases² was an Act of Congress involved which required the rendition of judgment for just compensation.

There is no merit in defendant's contention that there is a conflict in the decisions of the Court of Claims relative to the question of permitting interest. The jurisdictional ~~Act~~ in the present case and in *Virginia Engineering Company v. United States*, 89 C. Cis. 457, provided for judgments for just compensation. On the other hand in *Squaw Island Freight Terminal Co. v. United States*, 89 C. Cis. 269, the jurisdictional Act authorized the court to render judgment "for just compensation to it for loss of property and/or damages occasioned by the breaking of an inadequate and/or improperly and insufficiently constructed Government dike" (p. 277 footnote). The court in its opinion denied interest because the recovery awarded was not for just compensation but under the alternative clause for damages. In denying interest the court said:

"* * * but it is clear that it cannot recover interest on the damages sustained by reason of the failure of the defendant to maintain an adequate and properly constructed dike to protect plaintiffs' property from damage or to exercise reasonable diligence in repairing the same after the break on December 18, 1921, and before the damage sustained by plaintiff occurred.
* * *"

² *Boston Sand Co. v. United States*, 278 U. S. 41 (the direction was to enter judgment "for the amount of the legal damages sustained"); *Cherokee Nation v. United States*, 270 U. S. 476 (holding that no more interest was due on Indian claims than had previously been allowed); *District of Columbia v. Johnson*, 165 U. S. 330 (holding that an obligation did not become due until the passage of an Act affording a theretofore non-existent remedy); *United States v. North Carolina*, 136 U. S. 211 (holding that a State was not liable to pay interest on bonded indebtedness after the date when the principal was payable).

B. THE COURT HAVING FOUND A TAKING FOR THE USE AND BENEFIT OF THE UNITED STATES, JUST COMPENSATION INCLUDING INTEREST MUST BE AWARDED THE PLAINTIFF IRRESPECTIVE OF THE JURISDICTIONAL ACT.

The Court of Claims has found that, Colonel Ashburn pursuant to orders of the Acting Secretary of War seized Goltra's fleet without the consent of Goltra or his employees "for the use and benefit of the United States" (Findings 27 and 28; Opinion R. 52) and that appellant has retained possession of the fleet and caused it to be operated as part of its barge line (Finding 40).

These findings, to none of which defendant has excepted or assigned error, establish the taking of private property for public use. Just compensation under the Fifth Amendment is therefore payable to appellees.

To avoid this conclusion, appellant urges that the taking here was tortious and that therefore a different rule should apply. We know of no case which establishes such rule. In a sense any taking of private property for public use is tortious. Such taking constitutes a trespass. The Fifth Amendment and various Congressional Acts have afforded remedies for such taking of private property. It is true that ordinarily the United States cannot be sued for tortious acts by its officers. Where however relief for such acts has been afforded and where such acts amount to taking of private property for the public use, the ordinary measure of just compensation should be applied.

This Court has decided the precise point in *Shoshone Tribe v. United States*, 299 U. S. 476. That case involved the claim of the Shoshone Indians for compensation for land wrongfully taken from them by officers of the United States and given to another tribe of Indians. The jurisdictional act was not phrased in terms of just compensation and no specific provisions for interest was made. Defend-

ant as in the present case contended that the original taking had been tortious and that accordingly no sum measured by interest should be allowed. This Court reversing the Court of Claims held that interest constituted an inherent part of the recovery. Mr. Justice Cardozo speaking for the Court said:

"The claimant's damages include such additional amount beyond the value of its property rights when taken by the Government as may be necessary to the award of just compensation, the increment to be measured either by interest on the value or by such other standard as may be suitable in the light of all the circumstances.

"The fact is unimportant that the taking was tortious in its origin; if it was made lawful by relation. *Crozier v. Krupp, supra*. The fact also is unimportant that it was a partial taking only, and that eviction was not complete. *Jacobs v. United States*, 290 U. S. 13, 16; *United States v. Cress*, 243 U. S. 316, 327-330; *Hurley v. Kincaid*, 285 U. S. 95, 104. Finally the fact is unimportant, there having been an appropriation of property within the meaning of the Fifth Amendment, that the jurisdictional act is silent as to an award of interest or any substitute therefor. *United States v. Creek Nation, supra*, pp. 110, 111. Cf. *Yankton Sioux Tribe v. United States*, 272 U. S. 351, 359. Given such a taking, the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages. *Jacobs v. United States, supra*; *Phelps v. United States*, 274 U. S. 341; *Brooks-Scarlton Corp. v. United States*, 265 U. S. 106, 123; *Seaboard Air Line Co. v. United States*, 261 U. S. 299, 306. These cases distinguish *United States v. North American Co.*, 253 U. S. 330, cited by the Government which 'rested upon its special facts.' * * * * *

Close analogy is also furnished by the case of *Waite v. United States*, 282 U. S. 508. That suit was brought under

the Act of July 1, 1918, 40 Stat. 704, 705. The Act in so far as here material provides:

"That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture."

This Act did not make legal the unauthorized use of a patent by the United States but simply provided a remedy. The unauthorized use of a patent constituted tortious conduct. Nonetheless this Court held that interest should be allowed as part of the "entire compensation" by analogy to the cases decided under statutes in which Congress had provided for just compensation (*Seaboard Air Line Ry. Co. v. United States*, 261 U. S. 299; *Brooks-Scanlon Corp. v. United States*, 265 U. S. 106; *Liggett & Myers Tobacco Co. v. United States*, 274 U. S. 215; *Phelps v. United States*, 274 U. S. 341).

Similarly in the present case Congress has passed an Act entitling the appellees to recover for the taking of property and has recognized the applicability of the provisions of the Fifth Amendment by specifying recovery on the basis of claims for just compensation.

Certainly the taking of appellees' property here for the benefit of the defendant is no different in principle from the taking of plaintiffs' property in *Jacobs v. United States*, 290 U. S. 13. The flowing of plaintiffs' land was a common law trespass and would have been regarded as such in a litigation between private parties. Nonetheless this Court had no difficulty in permitting interest because the flowing constituted a taking of private property for public use.

The cases lay down no other test for awarding just compensation including a sum measured by interest than an affirmative answer to the question whether the action is based upon a taking of private property for public use. The findings and opinion of the Court of Claims herein have answered that question in plaintiffs' favor.

Conclusion.

Appellees respectfully move this Court to dismiss this appeal or to affirm the judgment below on motion.

Respectfully submitted,

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